**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

DAVID VELASQUEZ,
CDCR #D-75915,

Plaintiff,

vs.

A. BARRIOS, C. GREY,
C. ROBERTSON, M. LEVIN,
F. PASCUA, R. TORREZ, GONZALES,
FLINT, S. THOMS, C. HALL, N.
GRANNIS and L.E. SCRIBNER,

Defendants.

CASE NO. 07cv1130-LAB (CAB)

**ORDER**

**(1) ADOPTING WITH MODIFICATION REPORT AND RECOMMENDATION TO GRANT DEFENDANT FLINT'S AMENDED MOTION TO DISMISS;**

**and**

**(2) ADOPTING WITH MODIFICATION REPORT AND RECOMMENDATION TO GRANT COLLECTIVE DEFENDANTS' MOTION TO DISMISS**

[Dkt Nos. 32, 58, 57, 70, 83]

Plaintiff David Velasquez ("Velasquez") is proceeding *pro se* with a 42 U.S.C. § 1983 civil rights action arising from alleged constitutional violations and negligence by prison medical and administrative personnel associated with their responses to his needs while incarcerated in Calipatria State Prison. The matter is before the court on two Reports and Recommendations ("R&R") of the Magistrate Judge assigned to this case. The R&R addressing the Motion To Dismiss ("Motion") the First Amended Complaint (Dkt No. 9 "FAC") filed by all but two of the named defendants ("Collective Defendants") recommends the

Court grant the Motion, with leave to amend.[1] Dkt Nos. 32, 58. The R&R addressing the separate (and unopposed) Amended Motion To Dismiss filed by one of the two other named defendants, Dr. Frank B. Flint, M.D. (who was belatedly served) recommends granting the Amended Motion, with leave to amend. Dkt Nos. 57, 70. The remaining named defendant, Juan Gonzalez, appears not to have been served.[2]

The Court granted Velasquez extensions of time to file Objections to the R&Rs. Dkt Nos. 61, 66, 78. He filed Objections to the R&R addressing the Collective Defendants Motion, combining a Motion For Leave To Amend. Dkt No. 69. The Court accepted his subsequent filing of a Motion To Amend R&R Objections with supplemental medical records evidence. Dkt Nos. 82, 83. Velasquez missed the August 15, 2008 extended deadline to file Objections to the R&R addressing Dr. Flint's Motion, but the court received from him on August 18, 2008 a document captioned "Objections To Report And Recommendation" which purports to inform the Court he has "corrected" the error identified in the R&R associated with a state claims procedure, and again asks for leave to amend his complaint and for more time to respond. The Court separately rejects that belated filing, one of multiple attempted filings the Court has informed Velasquez in prior Orders are not appropriate responses in the procedural posture of this case.

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[1] Although the R&Rs refer to the "Complaint" rather than the FAC, it appears from Velasquez's Motion To File Amended Complaint (Dkt No. 7) the only change in the pleading between the original Complaint and the FAC was to correct a misspelling of a defendant's last name.

[2] The R&R alerts Velasquez that the provisions of FED. R. CIV. P. 4 (m) have not been satisfied as to Gonzalez and that the deficiency must be corrected or else the unserved defendant is subject to dismissal. The court construes the R&R paragraph headed "Service on Defendant Gonzalez" as the required notice to the plaintiff. R&R 10:7-16. As the FAC was filed October 16, 2008, and the R&R was filed May 23, 2008, and still no service on Gonzalez is reflected in the docket, the court hereby dismisses that defendant without prejudice under that authority. Velasquez, in his R&R Objections, argues defendant Gonzalez was purportedly served or should have been served by the Marshal. Dkt No. 69 pp. 1-2. However, even if service were effectuated on that defendant, the court finds from the face of the FAC, as a matter of law, Velasquez's allegations against him of Eighth Amendment violations fail to state a claim. He alleges Dr. Gonzalez saw him for his hernia, *and recommended surgery* be performed as soon as the Medical Review Committee authorized it. The FAC allegations substantiate Dr. Gonzalez thereafter became unavailable, with defendants advising Velasquez a new doctor would be instructed to schedule a surgical evaluation. No amendment could cure pleading defects against Dr. Gonzalez consistent with the facts pled against him in the FAC. Far from manifesting deliberate indifference to Velasquez's hernia condition, he intended to surgically correct the condition and recommended the procedure be approved and scheduled.

The Court has conducted a *de novo* review of the legal standards and the recommendations to which Velasquez has objected. For the reasons discussed below, the R&R recommending Dr. Flint's Amended Motion be granted is **ADOPTED**, and the R&R recommending the Collective Defendants' Motion be granted is **ADOPTED**, but in both instances the Court **REJECTS** the recommendation Velasquez be granted leave to amend his allegations in a Second Amended Complaint, terminating this action.

## I. BACKGROUND

### A. Factual Background

Velasquez's October 16, 2007 FAC alleges Eighth and Fourteenth Amendment cruel and unusual punishment and due process violations as well as state law negligence claims arising from the manner in which his medical needs and administrative appeals were addressed by prison officials and medical staff associated with a hernia, hernia surgery, and pain management before and after the surgery. He names as defendants: A. Barrios, a medically trained assistant; C. Gray, a supervising registered nurse; C. Robertson, a health care manager; M. Levin, a medical doctor; F. Pascua, a medical appeals examiner; Juan Gonzalez, a surgeon; R. Torrez, a medical appeals analyst; Frank B. Flint, a surgeon; S. Thomas, a doctor; C. Hall, an appeals examiner; N. Grannis, the chief inmate appeals coordinator; and L.E. Scribner, the Calipatria warden, whose responsibilities allegedly include reviewing all administrative appeals filed by inmates. Velasquez sues all the defendants in their individual and official capacities. FAC ¶¶ 4-15.

Velasquez alleges he first submitted a sick call slip seeking an examination for pain in his stomach in June 2005. FAC ¶17. He saw Dr. Gonzalez in July 2005. Dr. Gonzalez diagnosed the cause as a protruding hernia and recommended Velasquez's request for surgery be approved by the Medical Authorization Review Committee. FAC ¶¶ 18-19. Velasquez alleges he waited ten and one-half months for the committee to act. During that interval, on April 27, 2006, he was injured during an "assault" by prison officials unrelated to his FAC complaints, an incident he contends worsened his untreated hernia condition and associated pain. FAC ¶¶ 32-34. He submitted a third request for curative treatment on

May 10, 2006. FAC ¶¶ 20-22. That appeal was received and processed on May 12, 2006, with assignment to A. Barrios. Barrios initially entered in his report Velasquez was approved for the surgery, and the procedure was awaiting scheduling by the surgeon's office. He modified the report to explain Dr. Gonzalez was no longer available at the facility, but Velasquez would be scheduled for an appointment with the doctor's replacement. Defendants Levin and Pascua "upheld" the Barrios appeal response.[3] FAC ¶¶ 23-31.

Velasquez alleges he resubmitted his administrative appeal on July 21, 2006, reiterating his request for immediate surgery. FAC ¶ 36. On August 7, 2006, he spoke with defendant Thomas, "yard medical staff," about his pain and the fact he had been waiting almost a year for hernia repair surgery. He acknowledges he had been receiving medication for his pain during the interim, but told Thomas it was no longer effective because the hernia had worsened, and he asked for stronger medication. Thomas told him discourteously to be happy with the medication he was given. FAC ¶¶ 37-42. Velasquez alleges that response prompted him to file another administrative appeal, alleging misconduct, denial of medical care, and malpractice, because Thomas had been aware of Velasquez' pain since at least June 2006 when she examined him after he was taken to the infirmary to receive treatment for abdominal pain and had herself prescribed the pain medication Velasquez was given. FAC ¶¶ 43-51.

On August 22, 2006, defendants Gray and Robertson partially granted Velasquez's appeal. They stated: on April 19, 2006, the general surgeon had requested hernia repair be approved; the medical authorization review committee had authorized the procedure on May 9, 2006; the general surgeon who was scheduled to perform the procedure was unavailable for several months, but was now available for scheduling; and Velasquez "is high on the chronological list of patients to have surgery performed and will be scheduled in the near future," with the expectation "the procedure will be scheduled within the next 30 days." FAC ¶¶ 52-56. Velasquez was "dissatisfied" with that result because he had already waited

[3] To the extent Velasquez may intend to suggest something improper in the report modification, the two notations are not mutually exclusive and appear from the balance of the FAC allegations to both be true.

13 months, during which time the hernia had swelled to softball size, limiting his mobility and causing him extreme pain, back spasms, and weight gain. FAC ¶ 57-58. On August 24, 2006, he submitted another appeal to the "highest appeal level available" seeking immediate curative surgery, not "near future" surgery. FAC ¶ 59. Velasquez was finally admitted to the hospital for the operation on October 12, 2006, but only after he had contacted "Jon Wolff, supervising deputy Attorney General" and the prison law office on September 21, 2006. Dr. Flint performed the surgery on October 13, 2006. FAC ¶¶ 60-63.

On October 17, 2006, Velasquez was discharged to the prison yard "in spite of his weakened condition." He had a follow-up appointment with Dr. Flint the next day. At that time, he complained of continued muscle weakness, weight gain, back spasms, and limitations on his day-to-day activities. Dr. Flint told him he should be alright once his body healed from the surgery. FAC ¶¶ 65-68. On November 7, 2006, defendants Hall and Torres denied his (unspecified) appeal.[4] FAC ¶ 69. He thereafter submitted "repeated sick call request[s]," asking for sufficient pain medication and physical therapy "for the physical injuries sustained during his 16 month bout with a protruding hernia." FAC ¶ 70. He contends he continues to have back spasms, cannot shed the weight he gained, has not regained muscle strength, and is still in pain. FAC ¶ 74. He alleges "on information and belief" if he is not promptly provided with physical therapy, "he risks permanent disability and an indeterminate term of pain." FAC ¶ 75.

Based on the foregoing factual allegations, Velasquez alleges causes of action for deliberate indifference to his serious medical needs, in violation of the Eighth and Fourteenth Amendments, violations of his Due Process rights, and violations of California negligence law. FAC ¶¶ 76-79. He seeks a judgment declaring: defendants Barrios, Gray, Robertson, Levin, Pascua, and Hall violated his Due Process rights under the Fourteenth Amendment in the conduct of the medical appeal process, and Grannis and Scribner did so by sustaining the medical appeal results; defendants Gonzalez, Flint, Thomas, Pascua, Levin, Robertson,

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[4] If Velasquez is referring to the "highest level" appeal he filed on August 24, 2006 to demand the surgery, it had been mooted by his October surgery.

Gray, and Barrios violated his Eighth Amendment rights by failing and continuing to fail to provide medical care or "to take action to curb and/or remedy [his] pain and suffering;" defendants Thomas and Flint violated his Eighth Amendment rights by failing to prescribe adequate medication to relieve his pain and suffering, and Levin by sustaining their decisions; and all defendants violated the Eighth Amendment through unreasonable delay in scheduling and performing his hernia surgery. FAC p. 18. He also seeks injunctive relief in the form of an Order that he be immediately examined by a qualified physician,[5] that physical therapy or other follow-up treatment be arranged, and that he be prescribed medication to alleviate his pain. Finally, he seeks an award of monetary damages: in the amount of $100,000 "jointly and severally" against defendants Flint, Thomas, and Gonzalez; $10,000 "jointly and severally" against defendants Barrios, Gray, Robertson, Levin, Pascua, Torres, Hall, Grannis, and Scribner; and punitive damages in the amount of $20,000 each against defendants Gonzales, Flint, and Thomas, in the amount of $10,000 each against defendants Torrez, Hall, Scribner, and Grannis, and in the amount of $30,000 each against defendants Barrios, Gray, Robertson, Levin, and Pascua. FAC pp. 19-20.

**B. Procedural Background**

Velasquez presented for filing multiple motions while the Motions To Dismiss were under submission and around the time and after the two R&Rs were entered on May 23, 2008 and June 30, 2008. These attempted filings included: repeated requests for appointment of counsel; extensions of time to file Objections to the R&Rs; A "Motion To Amend" his objections to the first R&R, accompanied by supplemental medical records to augment his Objections to the R&R addressing the Collective Defendants' Motion; a Motion To Amend his California Tort Claims Act claim, accompanied by a new federal Complaint and a new state claim form, both of which he asked this Court to address simultaneously; and a Motion For Leave To File "And To Amend As To Doc. No. 32 and Doc. No. 57," also captioned "Objections To Report And Recommendation."

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[5] However, a prison inmate has no independent constitutional right to outside medical care additional and supplemental to the medical care provided by the prison staff within the institution. *See* Roberts v. Spalding, 783 F.2d 867, 870 (9th Cir. 1986).

The Court accepted via Discrepancy Order Velasquez's supplemental medical records evidence, **GRANTS** the Motion to augment his Objections with that evidence, and has considered those materials in ruling on the R&Rs.[6] Dkt No. 83. The Court rejected via Discrepancy Order the new California Tort Claims Act Form attached to a proposed new federal Complaint (presented as a Motion to Amend Complaint As To California Tort Claim) because they appear to be an attempt to raise a new claim. Velasquez must present any such claim to the appropriate state agency to obtain an administrative result there. Dkt No. 80. This Court is without jurisdiction to decide such claims in the first instance. The additional attachment to that material, purporting to be a new Complaint, was rejected for filing as premature, and his associated request to consolidate the tort claim process with federal adjudication of his civil rights causes of proposes an improper procedure. Finally, the Court also rejected via Discrepancy Order the ambiguous purported "Objections To Report And Recommendation" document because, despite that caption language, the pleading makes no reference to the first R&R, precedes in time the filing of the second (Dr. Flint Motion) R&R, references the docket numbers of only the Motions To Dismiss, not his Objections or the R&R, and because the document is in fact, as stated in its first sentence, an "Amended Complaint," not Objections to an R&R. Dkt No. 81.

The Collective Defendants' Motion was filed December 28, 2007. Dkt No. 32. The R&R deciding the Collective Defendants' Motion was filed May 23, 2008. Dkt No. 58. Velasquez filed Objections to that R&R on June 19, 2008, combined with a Motion For Leave To Amend, reasserting his need for appointed counsel. Dkt No. 69; *see also* Dkt No. 75. His Objections to the recommended disposition of that Motion are comprised solely of contentions he can "prove all his claims if given the opportunity to move forward." Dkt No. 69 p. 1. He relies on his proposed "Motion To Amend" in support of that argument, a filing the Court rejected for the reasons discussed above. Any new tort claim he believes he can pursue must proceed in the normal course through the state's administrative system before

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[6] "[A] district court has discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation." United States v. Howell, 231 F.3d 615, 622 (9th Cir. 2000).

it is ripe for adjudication here, assuming he can establish a constitutional violation associated with the tort, irrespective of any alleged "relationship" to the FAC in this action. The only substantive legal argument he advances in his Objections purports to rely on Estelle v. Gamble, 429 U.S. 97, 104 (1976) and the federal Constitution for the proposition: "a deliberate indifference claim may be stated when prison officials ignore[] the directives of the inmate's physician" because "government has obligation to provide medical care for those whom it is punishing by incarceration."[7] Dkt No. 69 pp. 1-2. Respondent filed no Reply.

Dr. Frank B. Flint's Motion was filed April 30, 2008 (Dkt No. 55), superseded by Corrected/Amended Motion filed May 1, 2008 ("Amended Motion" Dkt No. 57). Velasquez filed no Opposition. The R&R deciding Dr. Flint's Motion was filed June 30, 2008. Dkt No. 70. The deadline to file Objections to that R&R passed on July 31, 2008, with none filed. Velasquez subsequently requested an extension of time to file Objections to that R&R, which the Court granted on August 5, 2008, extending his deadline to August 15, 2008. He missed the August 15, 2008 extended deadline, but attempted a belated filing of a document captioned "Objections To Report And Recommendation" which purports to inform the Court he has "corrected" the error identified in the R&R associated with a state claims procedure, and again asks for leave to amend his complaint and for more time to respond. The result of any pending state administrative claim can only form the subject matter of a future cause of action not yet ripe for federal adjudication.

## II. DISCUSSION

### A. Legal Standards

#### 1. Motions To Dismiss

A FED. R. CIV. P. ("Rule") 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). Rule 8(a)(2) requires only

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[7] Velasquez also attaches to his Objections a copy of a newspaper article he represents appeared on September 20, 2007 in an unspecified publication captioned: "Report: Poor medical care kills inmates." Dkt No. 69. He highlights the last paragraph of the article which states, in its entirety: "Another inmate's death from a hernia was blamed on a five-week delay in getting him special treatment, the report said." Even acknowledging the recent notoriety of medical care in the state prison system, generalized reports and idiosyncratic examples of other inmate patient's conditions and results are irrelevant to the fact-specific civil rights claims of this particular plaintiff.

"a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, -- U.S. --, 127 S.Ct. 1955, 1964 (May 21, 2007), *quoting* Conley v. Gibson, 355 U.S. 41, 47 (1957). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," those allegations must be enough to raise a right to relief above the speculative level." Id. at 1964-65. "[S]ome threshold of plausibility must be crossed at the outset" before a case is permitted to proceed. Id. 127 S.Ct. at 1966 (citation omitted), *abrogating the formulation in* Conley, 355 U.S. at 45-46. Rule 12(b)(6) dismissal does not require appearance, beyond a doubt, that plaintiff can prove *no* set of facts in support of a claim that would entitle the plaintiff to relief.[8] "[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, 'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.' " Id. (citations omitted).

Thus, a complaint may be dismissed when it presents a cognizable legal theory, but fails to plead essential facts under that theory. Robertson v. Dean Witter Reynolds, Inc.,749 F.2d 530, 534 (9th Cir. 1984); *see* Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988). Dismissal is also warranted when the complaint lacks a cognizable legal theory. Robertson,749 F.2d at 534; *see* Neitzke v. Williams, 490 U.S. 319, 326 (1989) ("Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law"). In determining whether the complaint states a claim, the court assumes the truth of all factual allegations and must construe them in the light most favorable to the nonmoving party, including all reasonable inferences to be drawn from those facts. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996); Cedars-Sinai Medical Center v. National League of Postmasters of U.S., 497 F.3d 972, 975 (9th Cir. 2007). However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981); *see* Transphase

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[8] "It is not . . . proper to assume that [the plaintiff] can prove facts that it has not alleged or that the defendants have violated the [laws] in ways that have not been alleged." Bell Atlantic, 127 S.Ct. at 1969 n.8 (citation omitted).

Systems, Inc. v. Southern California Edison Co., 839 F.Supp. 711, 718 (C.D. Cal. 1993) (the court does not "need to accept as true conclusory allegations . . . or unreasonable inference") (citation omitted); *see also* Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003). When a Rule 12(b)(6) motion is granted, leave to amend is ordinarily denied only when it is clear the deficiencies of the complaint cannot be cured by amendment. DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992); Cahill, 80 F.3d at 339 (denial of leave to amend upheld as granting leave would have been futile).

In examining a claim's sufficiency, as opposed to its substantive merits, "a court may [ordinarily] look only at the face of the complaint to decide a motion to dismiss." Van Buskirk v. Cable Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002). However, a court conducting Rule 12(b)(6) review "may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006), *citing* Warren, 328 F.3d at 1141 n. 5. "The court may treat such a document as 'part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).' " Id., *quoting* United States v. Ritchie, 342 F.3d 903, 908 (9th Cir.2003).

**2. District Court's Review Of Magistrate Judge's R&R**

A district judge "may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions" on a dispositive matter prepared by a magistrate judge proceeding without the consent of the parties for all purposes. Rule 72(b); *see* 28 U.S.C. § 636(b)(1). An objecting party may "serve and file specific objections to the proposed findings and recommendations," and "a party may respond to another party's objections." Rule 72(b).

In reviewing an R&R, "the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. §636(b)(1); United States v. Raddatz, 447 U.S. 667, 676 (1980) (when objections are made, the court must make a *de novo* determination of the factual findings to which

there are objections). "If neither party contests the magistrate's proposed findings of fact, the court may assume their correctness and decide the motion on the applicable law." Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979). The court reviews *de novo* the magistrate judge's conclusions of law. Gates v. Gomez, 60 F.3d 525, 530 (9th Cir. 1995); Robbins v. Carey, 481 F.3d 1143, 1147 (9th Cir. 2007) ("determinations of law by the magistrate judge are reviewed *de novo* by both the district court and [the court of appeals]").

**3. Prisoner Civil Rights Actions Under 42 U.S.C. § 1983**

To prevail on a civil rights claim, a plaintiff must prove both that (1) a person acting under color of state law committed the conduct at issue, and (2) the conduct deprived the plaintiff of some right, privilege, or immunity protected by the Constitution or laws of the United States. 42 U.S.C. §1983; Leer v. Murphy, 844 F.2d 628, 632-33 (9th Cir. 1988); Jensen v. Lane County, 222 F.3d 570, 574 (9th Cir. 2000).

> 42 U.S.C. § 1983 creates a cause of action against a person who, acting under color of state law, deprives another of rights guaranteed under the Constitution. Section 1983 does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials. To prove a case under section 1983, the plaintiff must demonstrate that (1) the action occurred "under color of state law" and (2) the action resulted in the deprivation of a constitutional right or federal statutory right.

Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002) (citation omitted); Graham v. Connor, 490 U.S. 386, 393-94 (1989) (Section 1983 " is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred") (citation omitted).

Prison officials and staff acted under color of state law in the handling of Velasquez's medical complaints, satisfying the first element for the statement of a Section 1983 claim. He must also plead a cognizable constitutional violation. He challenges the manner in which defendants addressed his medical needs and processed his complaints through the institution's appeals process as violations of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. Only if he has stated a colorable claim for cruel and unusual punishment or due process violations, or it appears from the facts alleged he could

restate the claims in a manner potentially entitling him to relief, can he avoid termination of this action. The Court liberally construes the pleadings presented by a *pro se* civil rights plaintiff, affording the plaintiff the benefit of the doubt. Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621,623 (9th Cir. 1988). However, "a liberal interpretation of a civil rights complaint may not supply essential elements of a claim that were not initially pled." Ivey v. Bd. of Regents of the Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

**B. Eighth Amendment Pleading Standards**

The Eighth Amendment prohibits punishment that involves the "unnecessary and wanton infliction of pain." Estelle, 429 U.S. at 103, *quoting* Gregg v. Georgia, 428 U.S. 153, 173 (1976). This principle "establish the government's obligation to provide medical care for those whom it is punishing by incarceration." Id.; West v. Atkins, 487 U.S. 42, 54-55 (1988) ("indifference . . . manifested by prison doctors in their response to the prisoner's needs . . . states a cause of action under § 1983"). Penal institutions have conditions of confinement obligations to "furnish[] sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety." Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982); Farmer v. Brennan, 511 U.S. 825, 832 (1994). Nevertheless, "[a]fter incarceration, only the ' unnecessary and wanton infliction of pain '. . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." Whitely v. Albers, 475 U.S. 312, 319 (1986) "To be cruel and unusual punishment, conduct that does not purport to be punishment at all **must involve more than ordinary lack of due care** for the prisoners' interest or safety." Id. (emphasis added) (citations omitted). The Constitution "does not mandate comfortable prisons, . . . and only those deprivations denying 'the minimal civilized measure of life's necessities' . . . are sufficiently grave to form the basis of an Eighth Amendment violation." Wilson, 501 U.S. at 298, *quoting* Rhodes v. Chapman, 452 U.S. 337, 347, 349 (1981).

Prison officials violate a prisoner's Eighth Amendment right to be free from cruel and unusual punishment if they are deliberately indifferent to the prisoner's serious medical needs. Estelle, 429 U.S. at 106; Hunt v. Dental Dep't, 865 F.2d 198, 200 (9th Cir. 1989). To prevail on such a claim, the prisoner must satisfy both an objective element and a subjective

element. Farmer, 511 U.S. at 834; Wilson v. Seiter, 501 U.S. 294, 298-99 (1991); Hallett v. Morgan, 296 F.3d 732, 744 (9th Cir. 2002). The prisoner must first demonstrate the existence of an objectively serious medical condition of which the prison officials were or should have been aware. Estelle, 429 U.S. at 104-05; McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir 1992), *overruled on other grounds by* WMX Technologies, Inc. v. Miller, 104 F.2d 1133 (9th Cir. 1997). A "serious" medical need exists if the failure to treat a prisoner's condition could result in further *significant* injury *or* the "unnecessary and wanton infliction of pain." Estelle, 429 U.S. at 104. Examples of indications a prisoner has a "'serious' need for medical treatment" include: the "existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain. . . ." McGuckin, 974 F.2d at 1059-60; Lopez v. Smith, 203 F.3d 1122, 1131-32 (9th Cir. 2000). The court finds the protruding hernia condition Velasquez describes a sufficiently serious medical need adequate, for Rule 12(b)(6) purposes, to satisfy the objective component of an Eighth Amendment claim.

Once the prisoner's medical needs are identified and the defendant's response to those needs have been established, the court can determine whether an adequate showing of "deliberate indifference" can be made. The court must be able to find a "purposeful act or failure to act on the part of the defendant." Estelle, 429 U.S. at 105.

> Prison officials are deliberately indifferent to a prisoner's serious medical needs when they " 'deny, delay, or intentionally interfere with medical treatment.' " Hamilton v. Endell, 981 F.2d 1062, 1066 (9th Cir.1992) (*quoting* Hunt v. Dental Dep't, 865 F.2d 198, 201 (9th Cir.1989)). However, the officials' conduct must constitute " 'unnecessary and wanton infliction of pain' " before it violates the Eighth Amendment. Estelle, 429 U.S. at 104 [. . .] (*quoting* Gregg v. Georgia, 428 U.S. 153, 173 [. . .]; see also Frost, 152 F.3d at 1128.

Hallett, 296 F.3d at 744-45.

"Deliberate indifference" exists when a prison official "knows of and disregards an excessive risk to inmate health and safety; the official must be ***both aware of facts*** from which the inference could be drawn that a ***substantial risk of serious harm*** exists, ***and he***

***must also draw the inference***." Farmer, 511 U.S. at 837 (emphasis added). "Deliberate" indifference involves more than mere unconcern, negligence, or even malpractice. Hutchinson, 383 F.2d at 394 ("mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's Eighth Amendment rights"); Estelle, 429 U.S. at 106 ("[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner"). Inadequate treatment from malpractice, or even gross negligence, does not violate the Constitution.[9] Estelle, 429 U.S. at 106, 104; Gregg, 428 U.S. at173.

"Obduracy and wantonness, not inadvertence or error in good faith" characterize the actionable state of mind. Wilson, 501 U.S. at 299. Proof of this state of mind does not require a demonstration of express intent to cause harm on the part of the official, by either action or inaction, but the official must have been conscious of a substantial risk to the plaintiff, and yet have acted or failed to act upon that risk in a way that brought serious harm to the plaintiff. Farmer, 114 S.Ct. at 1980-81. Prison officials are deliberately indifferent to a prisoner's serious medical needs when they "deny, delay or intentionally interfere with medical treatment." Hutchinson v. United States, 838 F.2d 390, 394 (9th Cir. 1988). "[D]elay in providing a prisoner with [medical] treatment, standing alone, does not constitute an eighth amendment violation." Hunt, 865 F.2d at 200, *citing* Shapley v. Nevada Bd. of State Prison Comm'rs, 766 F.2d 404, 407 (9th 1985). "[T]he more serious the medical needs of the prisoner, and the more unwarranted the defendant's actions in light of those needs, the more likely it is that a plaintiff has established 'deliberate indifference' on the part of the defendant." McGuckin, 974 F.2d at 1061, 1059; *see* Hallatt, 296 F.3d at 746 (the Eighth Amendment is violated if "delays occurred to patients with problems so severe that delays would cause significant harm ***and*** that Defendants should have known this to be the case") (emphasis added); *see also* Shapley, 766 F.2d at 407 (a delay in medical treatment must lead to further injury to support a claim for deliberate indifference).

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[9] "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." Estelle, 429 U.S. at 106.

Differences in judgment between an inmate and prison medical personnel regarding appropriate medical diagnosis and treatment are not enough to state a deliberate indifference claim. *See* Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). "[N]ot every breach of [the duty to provide medical care] is of constitutional proportions." Hutchinson, 838 F.2d at 394. Minimum requirements to establish deliberate indifference are first, some purposeful act or failure to act by the defendant. Second, if the claim is delay of treatment, deliberate medical indifference requires a showing the denial was harmful. Shapley, 766 F.2d at 407. "[W]hen, as here, a claim alleges 'mere delay of surgery,' a prisoner can make 'no claim for deliberate medical indifference unless the denial was harmful.'" McGuckin, 974 F.2d at 1060 (citation omitted).

**C. Defendant Flint's Amended Motion To Dismiss**

Velasquez filed no Opposition to defendant Flint's Amended Motion To Dismiss the FAC. Dkt No. 57. The Court may construe a party's failure to oppose a motion as "a consent to the granting of a motion or other request for ruling by the court." Civ. L. R. 7.1(f)(3)(c). No party filed pertinent Objections to the R&R recommending the Motion be dismissed. The Court has reviewed *de novo* the legal standards applied by the Magistrate Judge in deciding the Rule 12(b)(6) Motion and her legal conclusions and finds under the applicable law dismissal is appropriate.

However, the Court rejects the R&R recommendation Velasquez be permitted to amend the FAC to attempt to restate a claim upon which relief can be granted as to Dr. Flint, the surgeon who performed Velasquez' hernia surgery. The FAC alleges Dr. Flint saw Velasquez only in connection with the actual surgery and at one follow-up examination shortly after he was released from the hospital, when he expressed his medical opinion Velasquez would feel better after he recovered from the surgery. Although Velasquez attributes his continuing symptoms to the long delay in obtaining surgical relief, and an exacerbating injury during an unrelated altercation with prison personnel in April 2006, he does not allege Dr. Flint contributed to the delay, nor do his allegations permit any inference Dr. Flint acted with the requisitely culpable state of mind to sustain an Eighth Amendment

claim against him. Velasquez acknowledges he was prescribed and received pain medication throughout the relevant time period. This Court finds under no construction of the alleged circumstances does Velasquez's pleading cross the minimal "threshold of plausibility" necessary to state an Eighth Amendment claim against Dr. Flint. Bell Atlantic, 127 S.Ct. at 1966. From the face of the FAC, Dr. Flint did not "fail to provide medical . . . care," nor can his alleged conduct support any reasonable inference he was deliberately indifferent to Velasquez's medical needs. *See* Rhoades, 452 U.S. at 342-43. Although leave to amend is liberally granted, particularly to *pro se* civil rights plaintiffs, such leave is not appropriate when, as here, it is clear the deficiencies of the complaint cannot be cured by amendment consistent with the FAC factual allegations. DeSoto, 957 F.2d at 658; *cf.* Lopez, 203 F.3d at 1131. Leave to amend is accordingly **DENIED** as to defendant Flint, and he is **DISMISSED** from this action with prejudice.

**D. Collective Defendants' Motion To Dismiss**

**1. Supervisory Defendants**

Velasquez alleges "on information and belief, when a prisoner files a grievance, the grievance staff calls the matter to the attention of their superior(s)," and Grannis and Scribner are those superiors. FAC ¶¶ 71-72. The FAC contends they should be held liable for the alleged constitutional violations of their subordinates. He offers nothing but speculative suggestions either of them may have had any personal involvement associated with the processing of his various administrative appeals to hasten his hernia surgery.

There is no *respondeat superior* or vicarious liability cognizable in 42 U.S.C. § 1983 actions. Monell v. Dept' of Soc. Serv. of the City of New York, 436 U.S. 658 (1978); Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002). A supervisor cannot be held personally liable by virtue of his or her position. Rather, liability can only be predicated on actual knowledge a constitutional violation was occurring and failure to act to prevent the harm, actual participation, or directing subordinates to cause the violation. Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). Vague and conclusory allegations of official participation in civil rights violations are insufficient to survive Rule 12(b)(6) dismissal. Ivey, 673 F.2d 268.

Velasquez fails to state a claim against Grannis or Scribner. His manner of pleading makes clear he has no factual basis to substantiate either the warden or the chief inmate appeals coordinator had any personal involvement in his administrative appeals in any manner required to state a claim under Taylor. Moreover, as discussed below, the Court finds Velasquez fails to state an Eighth Amendment violation associated with his medical needs against any of the named defendants. Absent an underlying constitutional violation, no 42 U.S.C. § 1983 claim can be stated. In addition, the Due Process discussion below with respect to the other administrative appeals process defendants, as well as the essential state of mind element with respect to the medical personnel defendants, apply equally to the grounds for dismissal of the supervisory defendants for failure to state a claim upon which relief can be granted. The Court **ADOPTS** the R&R recommendation these defendants be dismissed, but **MODIFIES** the R&R dismissal recommendation to eliminate leave to amend. The Court finds leave to amend the FAC to permit Velasquez to attempt to state an Eighth Amendment or Due Process violation against these defendants would be futile.

**2. Administrative Appeals Process Defendants**

Velasquez alleges Due Process violations against the defendants who processed his appeals: Pascua, a medical appeals examiner; Torrez, a medical appeals analyst; Hall, an appeals examiner; and Grannis, the chief inmate appeals coordinator. These defendants are prison administrators not directly entrusted with inmates' medical care. Prison administrators who "played [no] role in denying [the prisoner] medical care . . . cannot be held vicariously liable for the fault of [medical] personnel at [the prison]," even if the medical personnel themselves may be liable. Hunt, 865 F.2d at 200. The R&R traces Velasquez's allegations as to each of these defendants.

The Due Process Clause of the Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Clause encompasses both substantive and procedural due process. United States v. Salerno, 481 U.S. 739, 746 (1987) (analyzing the Due Process Clause of the Fifth Amendment). Substantive due process "prevents the government from engaging

in conduct that shocks the conscience . . . or interferes with rights implicit in the concept of ordered liberty . . . ." Id. (internal quotation marks and citations omitted). Procedural due process requires the government's deprivation of life, liberty, or property, even if consistent with substantive due process, "be implemented in a fair manner." Id. (citation omitted).

The requirements of procedural due process apply only to deprivations of interests encompassed by the Fourteenth Amendment's protection of liberty and property. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). To adequately plead procedural due process violations, a plaintiff must allege: (1) a life, liberty or property interest exists and has been subject to interference by the state; and (2) the procedures attendant upon that deprivation were constitutionally insufficient. Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460 (1990). In addition to liberty interests that arise directly from the Constitution, courts have long recognized state prison regulations may give rise to liberty interests that are protected by the Fourteenth Amendment. Meachum v. Fano, 427 U.S. 215, 223-227 (1976); Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974). Nonetheless, the interest created by the regulation must be something more than freedom from the restrictions ordinarily contemplated by a prison sentence. Sandin v. Conner, 515 U.S. 472 (1995).

Velasquez submitted numerous administrative appeals. To state a cognizable constitutional claim, he must do more than express his dissatisfaction with the results he received. An official's involvement in reviewing a prisoner's grievances is an insufficient basis for relief through a civil rights action. Moreover, where Eighth Amendment violations are alleged based on medical services access, the liability of prison officials requires their interference in a prisoner's ability to make medical needs known to the medical staff in order to satisfy the deliberate indifference element. Hoptowit, 682 F.2d at 1253, *citing* Estelle, 429 U.S. at 104. "[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of *and disregards* an *excessive* risk to inmate health or safety." Farmer, 511 U.S. at 837.

Velasquez's pleading substantiates each of his multiple administrative appeals was processed to a result, albeit results he characterizes as not reflecting sufficient urgency in

ensuring on-demand repair of his hernia. He does not allege the appeal reviewers rejected any medical recommendation with deliberate indifference to his discomfort or with the intent to prolong his suffering. His pleading substantiates these administrators impeded in no way Velasquez's ability to make his medical needs known to medical staff, as would be required to satisfy the "deliberate indifference" element of his claim. *See* Hoptowit, 682 F.2d at 1253. His allegations reflect the opposite of impediments: he made his medical needs known repeatedly to medical staff; he received action on all his requests from both medical staff and through the institution's appears process; the appeals administrators acknowledged his serious medical need; they credited and approved the recommendation for hernia repair surgery from his initial examining doctor; the surgical delay was explained to be the result of physician availability; and the administrators recommended he receive priority scheduling when the surgeon availability issue was resolved.

From the facts alleged, this Court must conclude Velasquez was "provided with a system of ready access to adequate [medical] care," and availed himself of it. Hunt, 865 F.2d at 200. His medical record exhibits and his pleading substantiate he was fully able "to make [his] medical problems known to medical staff" without impediment from the prison administrator defendants, and he received pain medication during the period of delay before the operation and thereafter. Id., *quoting* Hoptowit, 682 F.2d at 1253. He fails to allege any state of mind on the part of any of these administrators approaching the requisite deliberate indifference or wanton infliction of pain standard. Prison officials who "ignore[] the instructions of a prisoner's treating physician" may manifest deliberate indifference. Wakefield v. Thompson, 177 F.3d 1160,1165 (9th Cir. 1999); Estelle, 429 U.S. at 105. However, the allegations in this case substantiate none of the administrative defendants ignored the instructions of Velasquez's treating physician(s). As discussed below, the FAC allegations and his medical records reflect he was seen frequently by medical personnel throughout the relevant time period.

In addition, an isolated instance of conduct, absent egregious circumstances not remotely suggested here, cannot support an Eighth Amendment claim. For example,

Torrez's November 7, 2006 denial of Velasquez's appeal, after the hernia surgery he demanded had already been performed, can by no stretch of the imagination be construed as an adequate basis to permit the case to go forward on Eighth Amendment or Due Process violation theories. Similarly, Velasquez's attempts to elevate the conduct of Hall and Pascua in declining to decide his appeals in the manner he requested fall well short of pleading the necessary state of mind to warrant survival of his constitutional claims. Taking the FAC facts pled as true, Velasquez raises no inference of any deliberately indifferent state of mind. Accordingly, the Court **ADOPTS** the recommendation the administrative appeal defendants be dismissed from this action, but **MODIFIES** the recommendation to eliminate leave to amend the pleading as to them, leaving only the Motion To Dismiss contentions of the medical personnel.

**3. Medical Personnel Defendants**

"Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury state a cause of action under § 1983." Estelle, 429 U.S. at 105. "This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs, or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." Id. at 104-05 (footnotes omitted). The court focuses on the seriousness of the prisoner's medical needs and the nature of the defendants' response to those needs. *See* McGuckin, 974 F.2d at 1059. "Mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's Eighth Amendment rights." Hutchinson, 838 F.2d at 394.

The Court accepts as true Velasquez's allegations he experienced considerable discomfort associated with his hernia, and the discomfort and side effects worsened during the months he waited for his surgery to be scheduled and performed. The Court assumes a protruding hernia is a serious medical condition, as substantiated by Dr. Gonzalez's diagnosis and recommendation as well as the review committees' approval of that recommendation. His pleading accordingly satisfies the objective element required to state an Eighth Amendment claim.

Velasquez attempts to allege deliberate indifference on the part of the prison medical personnel he has served: Barrios, a medical trained assistant; Gray, a supervising registered nurse; Robertson, a health care manager; Levin, a medical doctor; Flint, a surgeon; and Thomas, a doctor. However, his allegations and medical records substantiate each saw him when he requested it. He was provided with medication during the delay between Dr. Gonzalez's July 2005 recommendation his hernia condition be approved for surgical repair and the actual surgery. His surgery was approved in May 2006, but was delayed, as explained in the August 2006 result of one of his multiple administrative appeals, due to scheduling availability of a surgeon, but with the notation Velasquez would be placed high on the priority list. His surgery was performed that October. He requested and received pain medication during the period of delay and after the surgery.

The statement of his claims amounts to a difference of opinion regarding appropriate medication or additional therapies he wanted during that time and post-surgery. His pleading and medical records establish his complaints were far from ignored. Responses to his needs reflected in the record defeat the potential for a finding of deliberate indifference to his medical needs. The exercise of professional judgment by prison doctors in their responses to a prisoner's needs does not support a 42 U.S.C. § 1983 cause of action as "unnecessary and wanton infliction of pain" actionable as an Eighth Amendment violation. Estelle, 429 U.S. at 104-05. Moreover, even "medical malpractice does not constitute cruel and unusual punishment." Hallett, 296 F.3d at 744, *citing* Estelle, 429 U.S. at 106. Differences in judgment between an inmate and prison medical personnel regarding diagnoses and appropriate treatment cannot sustain a deliberate indifference claim. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981). Similarly, a delay in treatment does not constitute a violation of the Eighth Amendment, unless the delay or denial was harmful. *See* McGuckin, 974 F.2d at 1060; Shapley, 766 F.2d at 407; Hunt, 865 F.2d at 200 ("[D]elay in providing a prisoner with dental treatment, standing alone, does not constitute an Eighth Amendment violation"). While the harm caused by delay need not necessarily be "substantial" (McGuckin, 974 F.2d at 1060

& n.2; *see also* Wood v. Housewright, 900 F.2d 1332, 1336, 1339-40 (9th Cir. 1990) (Reinhardt, J., dissenting)), the Eighth Amendment is violated if "delays occurred to patients with problems **so severe** that delays would cause **significant** harm ***and*** that Defendants should have known this to be the case" (Hallett, 287 F.3d at 1206 (emphasis added)). The FAC permits no inference the hernia surgery involved any complication arising from delay or resulted in any other kind of serious harm attributable to the scheduling delay.

In consideration of his treatment records, It does not appear to this Court Velasquez has pled a viable Eighth Amendment claim, or could replead one to correct the deficient state of mind element necessary to state the claim against these defendants. That material consists of eighteen (18) discrete Health Care Services Request Forms he submitted requesting to be seen by medical staff, spanning the dates April 3, 2005 (attachment page 13) through June 5, 2007 (attachment page 7). Each describes his particular complaint *and each reflects a "triage registered nurse" or doctor reviewed the request for health care services and made notes regarding his complaint and a treatment recommendation*.

In particular, eliminating those medical complaints that appear unrelated to his FAC claims,[10] the Supplemental Records reflect his requests, addressed by medical personnel, were for pain in his stomach[11] or sides or back, or for explicitly hernia-related concerns, or for pain medication (sometimes combined with other requests, such as a diet tray or an extra blanket (*see* 4/12/07 Supplemental Record p. 6)). In 2005, the requests are dated April 3,[12]

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[10] These include such complaints as: dry skin on fingertips, feet, and scalp (2/5/07, Supplemental Record p. 3); fever, faintness, sore throat, cough, trouble sleeping, runny nose (4/3/05, Supplemental Record p. 13); and constipation, requesting a "stronger dose" of medication because his stomach hurts (11/25/06 Supplemental Record p. 18).

[11] However, his stomach complaints appear to be associated with his complaints of constipation, not as a result of the hernia or of the hernia surgery aftermath. *See e.g.* 9/2/06 Supplemental Record p. 16: "I still need my metamucil cause now my stomach hurts even more cause it's hard to use the bathroom now. . . ." He does state, however, in his May 28, 2007 request: "Actually, my stomach never stopped hurting afer my surgery, but I can't seem to get the correct meds. . . ." Supplemental Record p. 7.

[12] It appears from notations in his April 3, 2005 Health Care Services Request forms he had had "recent surgery" of some kind. Supplemental Record p. 13. His Request dated July 14, 2005 states: "I have a hernia from the operation I had 9 months ago," and he requested "follow-up" from that prior surgery. Supplemental Record p. 4. The Court surmises the hernia at issue in this litigation

July 14, July 18, August 12, September 4, September 28, October 15, November 28. In 2006, he submitted such requests on May 18, August 12, September 2, September 27, and October 26. In 2007, he submitted requests on March 30, April 12, and May 28. The most recent document provided in the Supplemental Records is the May 28, 2007 request, where at page 7, he added the observation: "I can't seem to get the correct meds. I just live with it I guess???" The record thus shows a pattern of his repeated requests to be seen by CDC medical personnel for a variety of reasons, both before and after his hernia surgery, each request was acknowledged, usually with notations he was seen and evaluated in response to his request, and he received medication for his complaints. The treatment records convince the Court leave to amend the FAC to attempt to remedy the Eighth Amendment pleading deficiencies would be futile.

As to his additional allegations regarding Dr. Thomas, Velasquez characterizes her attitude on the three occasions he interacted with her as "discourteous." As traced in the R&R, he complains she manifested insufficient concern for his stomach complaints. He acknowledges she provided him with medication, defeating any claim she ignored or failed to respond to his needs and foreclosing a claim she wantonly sought to cause him pain or otherwise acted with the requisitely culpable state of mind to raise any constitutional concern. Differences of opinion over treatment "between a prisoner-patient and prison medical authorities regarding treatment does not give rise to a § 1983 claim." Franklin, 662 F.2d at 1344 (citation omitted). The purported "discourtesy" Velasquez describes in Dr. Thomas' attitude towards him is wholly insufficient to state a cognizable constitutional claim. *See* Freeman v. Arpaio, 125 F.3d 732, 738 (9th Cir. 1997) ("verbal harassment or abuse . . . is not sufficient to state a constitutional deprivation under 42 U.S.C. § 1983"); *see also* Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996), *amended* 135 F.3d 1318 (9th Cir. 1998) (disrespectful and assaultive comments by prison guard not enough to implicate the Eighth Amendment).

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is the same hernia he alludes to having resulted from other surgery he appears to have previously received in late 2004. He asserts no claims associated with that prior medical treatment, and such intervention reinforces his access to and utilization of prison medical resources.

Accepting all Velasquez's allegations as true, they fall short of stating a claim that could satisfy the pleading standard required to warrant allowing the case to proceed on an Eighth Amendment theory against the medical personnel defendants. The essential element of a culpable state of mind is lacking in his statement of that theory against any of them. The Court **ADOPTS** the R&R recommendation for dismissal, but **REJECTS** the recommendation leave to amend be granted. *See* Bell Atlantic, 127 S.Ct. at 1964-65; Robertson, 749 F.2d at 534; Balistreri, 901 F.2d at 699.

**4. State Law Negligence**

There remain no federal causes of action as a result of the Court's adoption of the R&Rs recommending both Rule 12(b)(6) Motions be dismissed for failure to state a claim upon which relief can be granted. The Court declines to exercise supplemental jurisdiction over the state law negligence claims. That result seems particularly appropriate because, as discussed above, Velasquez attempted to file a new federal Complaint, while these Motions were pending and after the R&R had been filed with respect to the Collective Defendants' Motion To Dismiss, which included what appeared to be an attempted new administrative claim under the California Tort Claims Act solely cognizable by the appropriate California agency in the first instance.

**D. Leave To Amend Not Warranted**

The Court concurs with the magistrate judge's conclusion Velasquez fails to state any cognizable constitutional claim against the named defendants. Applying the principle that leave to amend should be freely given, the R&R recommends the Rule 12(b)(6) Motions be granted "without prejudice and with leave to amend." R&R 10:20-21. However, "[i]t is not . . . proper to assume that [the plaintiff] can prove facts that it has not alleged or that the defendants have violated the [laws] in ways that have not been alleged." Bell Atlantic, 127 S.Ct. at 1969, n.8 (citation omitted). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations" to survive the attack, those allegations "must be enough to raise a right to relief above the speculative level." Id. at 1964-65 (citations omitted).

In this case, Velasquez *has* provided "detailed factual allegations" and, in the opinion of this Court, has pled himself out of federal court. The conduct alleged cannot plausibly be construed as rising to the level of any constitutional violation. He received medical attention or other appropriate response to each medical request he submitted, including a doctor's recommendation hernia surgery be approved. The surgery was authorized through the institution's medial procedures approval committee. He received the procedure, after a delay occasioned in material part by the unavailability of a surgeon. He received pain medication at all times relevant to this action. His multiple administrative appeals to attempt to force the medical personnel to give him different medications and otherwise to take his stomach and other pains more seriously were addressed through the institution's administrative channels to resolution, albeit not with the results or the timing Velasquez wanted, affording him all process he was due. When deficiencies cannot be cured by additional allegations consistent with those in the challenged pleading, as the Court finds to be the case here, leave to amend is not warranted.

## III. CONCLUSION AND ORDER

For all the forgoing reasons, **IT IS HEREBY ORDERED:**

1. This Court **ADOPTS** the R&R insofar as it recommends the claims against Flint be dismissed, but **REJECTS** that portion of the R&R recommending the dismissal be without prejudice and with leave to amend. Dkt No. 70, 5:7-10. Defendant Flint's Motion To Dismiss is **GRANTED**, and plaintiff's federal constitutional claims against him are **DISMISSED** with prejudice and without leave to amend. Defendant Flint's alternative Motion For More Definite Statement is **DENIED AS MOOT**.

2. The Court **ADOPTS** the R&R insofar as it recommends the claims against the Collective Defendants be dismissed, but **REJECTS** that portion of the R&R recommending the dismissal be without prejudice and with leave to amend. Dkt No. 58, 10:20-21. The Collective Defendants' Motion To Dismiss is **GRANTED**, and plaintiff's federal constitutional claims against them are **DISMISSED** with prejudice and without leave to amend.

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3. Plaintiffs' state law negligence claim is **DISMISSED** without prejudice in consideration of the dismissal of all the federal claims, disposing of all claims and all parties in this action.

4. The Clerk of Court shall terminate this case in its entirety.

**IT IS SO ORDERED**.

DATED: August 29, 2008

**HONORABLE LARRY ALAN BURNS**
United States District Judge